

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

PONANI N. SUKUMAR,

Plaintiff and Appellant,

v.

SCHWARTZ SEMERDJIAN HAILE  
BALLARD & CAULEY LLP et al.,

Defendants and Respondents.

B227259

(Los Angeles County  
Super. Ct. No. BC432753)

APPEALS from orders of the Superior Court of Los Angeles County,  
Mary H. Strobel, Judge. Affirmed.

Horvitz & Levy, Frederic D. Cohen and John F. Querio for Plaintiff and  
Appellant.

Butz Dunn & DeSantis, Douglas M. Butz and David D. Cardone for Defendants  
and Respondents Schwartz Semerdjian Haile Ballard & Cauley LLP and James Ballard.

Nemecek & Cole, Jonathan B. Cole, Mark Schaeffer and Jon D. Robinson for  
Defendants and Respondents Ronald D. Marks and Marks & Acalin, LLP.

---

Ponani Sukumar appeals an order granting special motions to strike his complaint for malicious prosecution and an order awarding attorney fees and costs to the defendants prevailing on the motions. His complaint is yet another chapter in a long-running saga of litigation between Ponani Sukumar and his former wife, Saraswati Sukumar.<sup>1</sup> Ponani's malicious prosecution complaint arises from Sara's prior malicious prosecution action against him, which in turn arose from Ponani's cross-complaint for indemnity filed in an action for breach of contract by Shih-Hua Alan Lee against Ponani and Sara.

Ponani contends the evidence in the record is sufficient to support a determination that Sara pursued her malicious prosecution action against him without probable cause and with malice. He also contends the denial of his request for leave to conduct discovery on the issue of malice was error. We conclude that the evidence in the record compels the conclusion that Sara had probable cause to sue Ponani for malicious prosecution and that he therefore cannot show a probability of prevailing on his complaint against her. We therefore will affirm the orders granting the special motions to strike and awarding attorney fees and costs.

### ***FACTUAL AND PROCEDURAL BACKGROUND***

#### *1. Lee's Breach of Contract Action*

Lee and Ponani were close friends. Lee filed a complaint against Ponani and Sara in February 2007 alleging that on various occasions he lent the Sukumars amounts

---

<sup>1</sup> For clarity and intending no disrespect, we will refer to Ponani Sukumar and Saraswati Sukumar as Ponani and Sara, respectively.

in excess of \$1.4 million pursuant to an oral agreement. He alleged that Ponani and Sara failed to make payments on the loans. Lee alleged a count against Ponani and Sara for breach of contract and two common counts.

Sara filed a cross-complaint against Ponani and Lee in April 2007 alleging that she never entered into an oral agreement with Lee and that she had no knowledge of Ponani's alleged oral agreement with Lee until February 2006. She alleged that if Ponani entered into the alleged oral agreement without her knowledge, he did so in violation of his fiduciary duty to Sara as his wife. Sara alleged counts for (1) breach of fiduciary, against Ponani; (2) conspiracy to breach fiduciary duty, against Ponani and Lee; (3) declaratory relief; and (4) equitable indemnity.

Ponani filed a cross-complaint against Sara in May 1997 alleging that Sara was aware of the money obtained from Lee and that she and Ponani both personally entered into the alleged oral agreement with Lee. He alleged:

“Cross-Defendant Saraswati Sukumar was at all times aware of any and all monies received from Plaintiff Lee and consented to the use of monies loaned by Plaintiff Lee for the Sukumar's [*sic*] living expenses, including payments on the mortgage of the family residence. [¶] . . . The alleged oral contract was personally entered into by Cross-Complainant, Cross-Defendant Saraswati Sukumar and Plaintiff Lee.”

Ponani alleged counts against Sara for declaratory relief and equitable indemnity. Although he alleged two separate counts, the allegations were essentially identical with both counts seeking a declaration that Ponani was entitled to partial equitable

indemnity, based on Sara's undivided one-half interest in the community estate, for any damages awarded to Lee pursuant to the complaint.

Ponani and Lee entered into a stipulated judgment filed in June 1998 providing that Ponani was liable to Lee in the amount of \$880,000. Ponani advised the trial court shortly before the nonjury trial in August 1998 that he would assert his Fifth Amendment privilege against self-incrimination and would not testify regarding the alleged loans, and therefore would dismiss his cross-complaint against Sara without prejudice.<sup>2</sup>

The trial court in the Lee action found that Sara had no knowledge of the cash payments from Lee. The court found that Ponani kept the door to his home office locked when they were married and refused to discuss finances with Sara, despite her inquiries. Lee produced a series of documents that he claimed were loan requests from Ponani. The court stated in its statement of decision filed on September 4, 1998, "It is very likely that all of these documents were produced at the same time and for the purpose of this litigation." The court found that Lee continued to provide large sums of money to Ponani's father during the course of the litigation and that they had remained friends and had recently dined together and attended Star Trek conventions together.

The trial court stated that Lee's claim that the payments were loans was "completely unbelievable and unsupported by the evidence." It found that the payments

---

<sup>2</sup> Ponani later explained that he was concerned about the potential criminal implications of his failure to disclose the purported loans from Lee on loan applications and that he was advised by counsel that he could not both assert his privilege against self-incrimination and pursue his cross-complaint against Sara.

from Lee were gifts. The court stated, “It is very likely this suit was orchestrated by Mr. Sukumar to gain a tactical advantage in the marital dissolution case.” The court found in favor of Sara on Lee’s counts against her, rendering Sara’s cross-complaint moot.

2. *Sara’s Malicious Prosecution Action*

a. *Malicious Prosecution Complaint*

Sara filed a complaint for malicious prosecution against Lee, Lee’s attorney, and Ponani in February 2002 and filed a first amended complaint against the same defendants in November 2003. She alleged that there was no probable cause to file either Lee’s complaint or Ponani’s cross-complaint against her and that the defendants acted with malice. She alleged a single count for malicious prosecution against all defendants. Her attorneys in the litigation were Schwartz Semerdjian Haile Ballard & Cauley LLP (Schwartz Semerdjian), James Ballard, Marks & Acalin, LLP (Marks & Acalin), and Ronald D. Marks.

b. *Special Motions to Strike*

Ponani filed a special motion to strike Sara’s complaint under the anti-SLAPP statute (Code Civ. Proc., § 425.16). Lee also filed a special motion to strike. Ponani argued that Sara could not establish a probability of prevailing on the element of favorable termination of the prior action because she could not show that the voluntary dismissal of his cross-complaint for indemnity reflected on the merits of his cross-complaint. Ponani also argued that Sara could not show that he lacked probable cause to file his cross-complaint against her and could not show malice.

Sara opposed Ponani's motion, arguing that the dismissal of his cross-complaint in those circumstances reflected on the merits and constituted a favorable termination. She also argued that the record from the prior action showed that Ponani knew that Lee's complaint was completely without merit and knew that his cross-complaint was untenable. She argued that Ponani and Lee collaborated in an effort to ruin her financially and that Ponani had no probable cause to file his cross-complaint. She also argued that the trial court in the prior action found that Ponani acted with malice and that the evidence showing a lack of probable cause also showed malice.

The trial court denied Ponani's special motion to strike in December 2003, stating that the malicious prosecution complaint arose from protected activity under the anti-SLAPP statute and that Sara had established a probability of prevailing on her claim. The court also denied Lee's special motion to strike.

c. *Appeal from the Denial of the Special Motion to Strike*

The Court of Appeal, Fourth Appellate District, Division One, affirmed the order denying the special motions to strike (*Sukumar v. Sukumar* (Nov. 16, 2004, D043538) [nonpub. opn.]). It stated that Sara's malicious prosecution complaint against Ponani was based on the theory that Ponani and Lee knew that the payments provided by Lee were gifts rather than loans and that the two men collaborated in filing Lee's meritless complaint against Sara in order to pressure her into making concessions in the marital dissolution proceeding or to financially ruin her. It stated that regardless of whether Sara obtained a favorable termination of the action on Ponani's cross-complaint against her, it was undisputed that she obtained a favorable termination of the action on Lee's

complaint against her and that in light of the theory of Sara's complaint against Ponani this satisfied the favorable termination requirement.

The Court of Appeal stated that the evidence supported a reasonable inference that Ponani and Lee knew that there were no loans, and therefore concluded Sara had established a probability of prevailing on the issue of lack of probable cause to file Lee's complaint. The Court of Appeal stated that it was unnecessary to decide whether Sara had established a probability of prevailing on the issue of lack of probable cause to file Ponani's cross-complaint. It stated that Sara's malicious prosecution claim against Ponani with respect to the cross-complaint depended on the alleged conspiracy with Lee and therefore depended on the lack of probable cause to file Lee's complaint. It therefore did not separately address the issue of lack of probable cause to file Ponani's cross-complaint. It also concluded that the evidence supported an inference that Ponani and Lee instituted the action against Sara with malice. The Court of Appeal therefore affirmed the denial of both Ponani's and Lee's special motions to strike.

d. *Summary Judgment Motions*

Ponani filed a motion for summary judgment against Sara's complaint in February 2006. Lee also filed a summary judgment motion. Ponani argued that the voluntary dismissal of his cross-complaint against Sara was not a favorable determination reflecting on the merits of his cross-complaint, that his cross-complaint was closely intertwined with the family law proceeding and a malicious prosecution cannot arise from a family law proceeding, and that the prior disposition of some of the claims alleged in Lee's complaint and in Sara's cross-complaint established probable

cause for Ponani's cross-complaint and established collateral estoppel. Sara opposed the motions.

The trial court denied Ponani's and Lee's summary judgment motions in May 2006, citing *Bergman v. Drum* (2005) 129 Cal.App.4th 11. The trial court stated that it was undisputed that "there was a civil action with a termination favorable to plaintiff" and that the civil action was separate from the marital dissolution proceeding. The court also stated that the summary judgment motions were not based on theories or facts different from those asserted in Ponani's and Lee's special motions to strike.

e. *Trial*

Sara's malicious prosecution complaint against Ponani and Lee proceeded to trial. During the trial, Sara abandoned the theory that Ponani and Lee conspired to file Lee's complaint against her and proceeded on the sole theory that Ponani lacked probable cause to file his cross-complaint for indemnity. Sara later moved to amend her complaint to conform to proof at trial to allege that Ponani and Lee conspired to file Lee's complaint against her. The trial court denied the motion, found that Ponani had probable cause to file his cross-complaint for indemnity and granted his motion for nonsuit. The court entered a judgment on December 26, 2006, dismissing Ponani as a defendant, stating that the dismissal was "based on the Court's determination that Ponani Sukumar had probable cause for filing his Cross-Complaint against Plaintiff in the underlying action."



Sara's malicious prosecution complaint against Lee was tried to a jury, ultimately resulting in a judgment awarding her \$960,000 in economic and noneconomic damages and \$1,454,000 in punitive damages.

f. *Appeal from the Judgment*

Sara appealed the judgment of nonsuit in favor of Ponani. The Court of Appeal, Fourth Appellate District, Division One concluded that Ponani had probable cause to file and prosecute his cross-complaint for indemnity. The Court of Appeal rejected Sara's contention that a factual dispute regarding Ponani's knowledge precluded the trial court from finding that he had probable cause as a matter of law. It stated even if Ponani knew that Lee's loan claims and Ponani's allegations that Sara knew about and agreed to those loans were false, Ponani was subject to potential liability to Lee and therefore had probable cause to file and prosecute his cross-complaint for indemnity. (*Sukumar v. Sukumar* (Apr. 8, 2009, D050303) [nonpub. opn.] pp. 29-30.) The Court of Appeal therefore affirmed the judgment of nonsuit in favor of Ponani.

Lee also appealed the judgment against him on Sara's malicious prosecution complaint. The Court of Appeal affirmed the judgment in favor of Sara and against Lee.

3. *Ponani's Malicious Prosecution Action*

a. *Ponani's Complaint*

Ponani filed a complaint for malicious prosecution in February 2010 and filed a first amended complaint in March 2010. He alleges a single count for malicious prosecution against Sara, Schwartz Semerdjian, Marks & Acalin, and Marks.

Ponani alleges that Sara asserted two distinct theories of liability against him in her malicious prosecution complaint. He alleges that her first theory was that Ponani conspired with Lee to have Lee maliciously prosecute Lee's complaint against Sara. Ponani alleges that her second theory was that Ponani maliciously prosecuted his cross-complaint for indemnity against Sara. He alleges that Sara abandoned her first theory on the eve of trial and tried only her second theory, resulting in a nonsuit.

Ponani alleges that he obtained a favorable termination on the merits and that Sara and her attorneys initiated and continued to prosecute the complaint on the second theory against him without probable cause and with malice.

b. *Special Motions to Strike*

Schwartz Semerdjian filed a special motion to strike Ponani's complaint. It argued that Ponani could not establish the element of lack of probable cause because the denial of his special motion to strike Sara's malicious prosecution complaint and the denial of his summary judgment motion against Sara's complaint established the existence of probable cause as a matter of law.

Marks & Acalin and Marks also filed a special motion to strike the complaint. They argued that Ponani could not establish the element of lack of probable cause for the same reasons. They also argued that Ponani could not establish the element of malice. They filed a declaration by Marks stating that his only objective in filing the complaint on Sara's behalf was to obtain compensation for his client, that he believed at the time that the claims against Ponani had merit and that he bore no ill-will against Ponani.

Ponani filed an ex parte application to shorten the time to file a motion for leave to conduct discovery despite the stay imposed upon the filing of the special motions to strike, pursuant to Code of Civil Procedure section 425.16, subdivision (g). The trial court denied the ex parte application without prejudice, finding that there was no good cause to grant leave to conduct discovery.

Ponani filed a combined opposition to both special motions to strike. He argued that the nonsuit in his favor satisfied the requirement of a favorable termination of the action against him. He also argued that the defendants had no probable cause to prosecute the second theory of Sara's malicious prosecution complaint against him because no reasonable attorney could have believed that he lacked probable cause to file his cross-complaint for indemnity against Sara. He argued that this was so because he was potentially liable to Lee for a marital community debt and therefore had probable cause to file and prosecute his cross-complaint for indemnity against Sara as a matter of law. He also argued that the denial of his special motion to strike and the denial of his summary judgment motion in the prior action did not establish that Sara had probable cause to sue him for malicious prosecution. He argued further that the lack of probable cause to sue him, the defendants' failure to show any substantial damages resulting from his cross-complaint and evidence that he relied on the advice of counsel in filing the cross-complaint showed that the defendants prosecuted the malicious prosecution complaint with malice. Ponani also renewed his request for leave to conduct discovery.

The trial court concluded that the denial of Ponani's summary judgment motion against Sara's complaint established that Sara had probable cause to sue him for

malicious prosecution, citing *Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 378. The court also stated that, separate and apart from that conclusion, Ponani failed to present evidence sufficient to support a finding that Sara lacked probable cause to sue him for malicious prosecution. The court therefore granted the special motion to strike in favor of all moving defendants. The court expressly did not decide whether the denial of Ponani's special motion to strike established that Sara lacked probable cause to sue him for malicious prosecution or whether Ponani established a probability of prevailing on the element of malice. The court did not discuss whether Ponani obtained a favorable termination of Sara's complaint against him. The court denied Ponani's request for leave to conduct discovery.

Ponani timely appealed the order granting the special motions to strike.

c. *Attorney Fee Awards*

Schwartz Semerdjian moved for an award of attorney fees and costs as the prevailing defendant on a special motion to strike (Code Civ. Proc., § 425.16, subd. (c)(1)). Marks & Acalin and Marks also moved for an award of attorney fees and costs. The trial court granted the motions, awarding a total of \$21,450 and \$41,184.50, respectively, on each of the two motions. Ponani timely appealed the order awarding attorney fees and costs.

***CONTENTIONS***

Ponani contends (1) he demonstrated a probability of prevailing on his malicious prosecution complaint on the element of probable cause because no reasonable attorney could have believed that his cross-complaint for indemnity was untenable; (2) neither

the denial of his summary judgment motion against Sara’s complaint for malicious prosecution nor the denial of his anti-SLAPP motion established that Sara had probable cause to sue him for malicious prosecution with respect to the filing of his cross-complaint; (3) he has demonstrated a probability of prevailing on the element of malice and, if not, he is entitled to leave to conduct discovery on malice; and (4) if the order granting the special motions to strike is reversed, he is to entitled to the reversal of the awards of attorney fees and costs.<sup>3</sup>

### ***DISCUSSION***

#### ***1. Special Motion to Strike***

A cause of action is subject to a special motion to strike if the defendant shows that it arises from an act in furtherance of the defendant’s constitutional right of petition or free speech in connection with a public issue and the plaintiff fails to demonstrate a probability of prevailing on the claim. (§ 425.16, subd. (b)(1); *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) On appeal, we independently review both of these determinations. (*Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1345-1346.)

A plaintiff establishes a probability of prevailing on the claim by showing that the complaint is legally sufficient and supported by a prima facie showing of facts that, if proved at trial, would support a judgment in the plaintiff’s favor. (*Taus v. Loftus*

---

<sup>3</sup> Ponani also argues briefly in a footnote that “[i]t is beyond reasonable dispute that” he obtained a favorable termination in Sara’s malicious prosecution action against him.

(2007) 40 Cal.4th 683, 713-714.) The court cannot weigh the evidence, but must determine as a matter of law whether the evidence is sufficient to support a judgment in the plaintiff's favor. (*Ibid.*) The defendant can defeat the plaintiff's evidentiary showing, however, by presenting evidence that establishes as a matter of law that the plaintiff cannot prevail. (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821(*Wilson*).)

“Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.” (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

## 2. *Malicious Prosecution*

A plaintiff in a malicious prosecution action must prove that (1) the defendant or someone acting at the defendant's direction commenced an action against the plaintiff that was terminated in the plaintiff's favor; (2) the defendant initiated or continued to prosecute the action without probable cause; and (3) the defendant acted with malice in initiating or continuing to prosecute the action. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 292 (*Soukup*); *Zamos v. Stroud* (2004) 32 Cal.4th 958, 970 (*Zamos*).)<sup>4</sup> If the prior action charged multiple grounds of liability, a malicious

---

<sup>4</sup> *Zamos, supra*, 32 Cal.4th at page 970, held that “an attorney may be held liable for malicious prosecution for continuing to prosecute a lawsuit discovered to lack probable cause.” Although *Zamos* did not separately address the element of malice, we conclude that the rule that an attorney may be held liable for continuing to prosecute an action after discovering that it lacks probable cause compels the conclusion that the defendant's malice in continuing to prosecute an action in those circumstances is

prosecution action will lie if any of those grounds was asserted without probable cause and with malice. (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 671.)

A favorable termination of the prior action means a termination in favor of the malicious prosecution plaintiff in a manner that “ ‘reflect[s] the merits of the action and the plaintiff’s innocence of the misconduct alleged in the lawsuit.’ [Citation.]” (*Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 342.) For example, a summary judgment based on the insufficiency of evidence to establish a triable issue of fact is a favorable termination. (*Ibid.*) In contrast, a termination in favor of the malicious prosecution plaintiff on “ ‘technical or procedural’ ” grounds that do not reflect the plaintiff’s innocence of the misconduct alleged, rather than substantive grounds, does not constitute a favorable termination for purposes of malicious prosecution. (*Ibid.*) Examples include a dismissal on statute of limitations grounds, a dismissal pursuant to a settlement, and a dismissal on the grounds of laches. (*Ibid.*)

Whether a dismissal or other order or judgment constitutes a favorable termination is a question of law for the court to decide. (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1149.)

“Probable cause” in the context of malicious prosecution means an objectively reasonable belief that the action is legally tenable. (*Soukup, supra*, 39 Cal.4th at p. 292.) A person has no probable cause to initiate or continue to prosecute an action if

---

sufficient to satisfy the element of malice. (See *Soukup, supra*, 39 Cal.4th at pp. 296-297; *Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 226; *Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1408 & fn. 12.)

the person relies on facts that he or she has no reasonable cause to believe to be true or seeks recovery on a legal theory that is untenable under the facts known to him or her. (*Ibid.*) There is no probable cause to initiate or continue to prosecute an action only if no reasonable attorney would believe that the action has any merit and any reasonable attorney would agree that the action is totally and completely without merit. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 743, fn. 13; *Wilson, supra*, 28 Cal.4th at p. 817.)

The probable cause determination is objective and is based on the facts known to the malicious prosecution defendant at the time the action was initiated or prosecuted. (*Zamos, supra*, 32 Cal.4th at p. 971.) Probable cause is a low threshold designed to protect a litigant's right to assert arguable legal claims even if the claims are extremely unlikely to succeed. (*Jarrow Formulas, supra*, 31 Cal.4th at pp. 742-743; *Wilson, supra*, 28 Cal.4th at p. 817.)

Whether there was probable cause to initiate or continue to prosecute an action in light of the facts known to the malicious prosecution defendant at the time is a legal question for the court to decide. (*Wilson, supra*, 28 Cal.4th at p. 817; *Sheldon Appel Co. v. Albert & Olier* (1989) 47 Cal.3d 863, 875.) A controversy as to what facts were known to the malicious prosecution defendant at the time the action was initiated presents a question of fact for the trier of facts. (*Sheldon Appel, supra*, at p. 881.) If there is no dispute as to what facts were known or if the factual dispute is not material to the probable cause determination, however, probable cause is a pure question of law. (*Ibid.*)



Malice concerns a person's subjective intent in initiating, or continuing to prosecute, an action and is a question of fact for the trier of facts. (*Sheldon Appel, supra*, 47 Cal.3d at p. 874.) A malicious prosecution defendant initiated or continued to prosecute a prior action with malice only if he or she acted primarily for an improper purpose, that is, a purpose other than to secure a proper adjudication on the merits. (*Albertson v. Raboff* (1956) 46 Cal.2d 375, 383; *Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 494; see Rest.2d Torts, § 676.) Some of the principal situations in which a person initiates or continues to prosecute an action primarily for an improper purpose include (1) when the person does not believe that the claim is meritorious; (2) when the person initiates or continues to prosecute the action because of hostility or ill will, to harass the defendant; (3) when the person initiates or continues to prosecute the action for the purpose of depriving the defendant of beneficial use of the defendant's property; (4) when the person initiates or continues to prosecute the action for the purpose of forcing a settlement unrelated to the merits of the action; and (5) when a defendant files or continues to prosecute a cross-complaint for the purpose of delaying adjudication of the complaint. (Rest.2d Torts, § 676, com. c., pp. 462-463; see *Albertson, supra*, 46 Cal.2d at p. 383, citing Rest., Torts, § 676, com. b.)

3. *Ponani Failed to Show a Probability of Prevailing on the Element of Probable Cause*

Ponani alleges that the defendants had no probable cause to sue him for malicious prosecution arising from the prosecution of his cross-complaint for indemnity. The defendants lacked probable cause to sue him for malicious prosecution

on this ground only if no reasonable attorney would have believed that this ground was legally tenable. In other words, the defendants lacked probable cause only if no reasonable attorney would have believed that Ponani's cross-complaint was maliciously prosecuted. Ponani argues that no reasonable attorney would have so believed and that any reasonable attorney would have agreed that he had probable cause to sue Sara for indemnity because of his potential liability to Lee for a community debt.

The question for purposes of ruling on the special motion to strike is not whether Ponani actually had probable cause to sue Sara for indemnity. Instead, the question is whether he presented evidence sufficient to support a determination that no reasonable attorney would have believed that he lacked probable cause to sue Sara for indemnity. His malicious prosecution complaint is a SLAPP only if it lacks even minimal merit. (*Navellier v. Sletten, supra*, 29 Cal.4th at p. 89.)

Ponani had no probable cause to sue Sara for indemnity if he had no reasonable cause to believe that he was subject to potentially liability to Lee for the purported loans. In our view, the facts that Sara was previously unaware of the purported loans and was aware that Lee and Ponani were and had remained close friends, and that the trial court in Lee's breach of contract action found that Lee's claim that the payments to Ponani were loans was "completely unbelievable and unsupported by the evidence" support the reasonable inference that Ponani knew that there were no loans and no basis for any potential liability to Lee or for any indemnity.

Thus, the evidence known to Sara throughout the time that she filed and continued to prosecute her complaint for malicious prosecution against Ponani

supported an objectively reasonable belief that Ponani had no probable cause to sue her for indemnity. Sara therefore had probable cause to allege that Ponani had no probable cause to sue her for indemnity. This is true regardless of the later determination by the trial court in Sara's malicious prosecution action, affirmed by the Court of Appeal, that Ponani had probable cause to sue Sara for indemnity. We therefore reject Ponani's contention that the evidence compels the conclusion that no reasonable attorney could have believed that his cross-complaint for indemnity was untenable and conclude that he failed to establish a probability of prevailing on his malicious prosecution complaint on the element of Sara's lack of probable cause.

In light of our conclusion, we need not address Ponani's other contentions.

***DISPOSITION***

The orders granting the special motions to strike and awarding attorney fees and costs to the defendants prevailing on the motions are affirmed. The defendants are entitled to recover their costs on appeal.

***NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS***

CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

KITCHING, J.